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RICHARD W. MEYER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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KRONENBERGER ROSENFELD, LLP
Karl S. Kronenberger (Bar No. 226112)
Jeffrey M. Rosenfeld (Bar No. 222187)
Virginia A. Sanderson (Bar No. 240241)
150 Post Street, Suite 520
San Francisco, CA 94108
Telephone: (415) 955-1155
Facsimile: (415) 955-1158
karl@KRInternetLaw.com
jeff@KRInternetLaw.com
ginny@KRInternetLaw.com

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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

MEJ

CV 12 1203

Case No.

ANDREW HUMBLE, an individual,
individually and on behalf of a class of
similarly situated persons,

CLASS ACTION COMPLAINT

Plaintiff,

DEMAND FOR JURY TRIAL

vs.

WISE MEDIA, LLC, a Georgia Limited
Liability Company, and **DOES 1-10**,
inclusive,

Defendants.



1 Plaintiff Andrew Humble, individually and on behalf of a class of similarly situated
2 persons, brings this action, by and through his undersigned counsel, and alleges as
3 follows:

4 INTRODUCTION

5 1. This action concerns a scheme by Defendant Wise Media, LLC ("Wise
6 Media" or "Defendant") to enroll consumers—without their knowledge or consent—in a
7 short message service ("SMS") text subscription plan with a monthly membership fee of
8 \$9.99.

9 2. According to Defendant, consumers voluntarily subscribe to receive three
10 SMS texts per week, delivered to their cellular phones, which texts provide "flirting tips"
11 (the "Subscription Plan").

12 3. The truth is, few or no consumers voluntarily subscribed to any such
13 service. Instead, Defendant sent unsolicited texts to consumers who had no prior
14 relationship with Defendant.

15 4. If a consumer failed to respond to Defendant's text in a manner of minutes,
16 Defendant enrolled the consumer in the Subscription Plan without the consumer's
17 authorization, and charged the consumer \$9.99 per month until he or she noticed the
18 charge and cancelled the service.

19 5. As a result of Defendant's deceptive practices, including its use of
20 consumers' cell phone numbers to send unsolicited text messages and to involuntarily
21 enroll consumers in the Subscription Plan, Plaintiff and numerous other consumers similar
22 to Plaintiff were wrongfully charged subscription fees.

23 JURISDICTION AND VENUE

24 6. This Court has subject matter jurisdiction under 28 U.S.C. §1331 for
25 Plaintiff's claim under the Telephone Consumer Protection Act, 47 U.S.C. §227. This
26 Court has subject matter jurisdiction under 28 U.S.C. §1367 for Plaintiff's remaining
27 claims because they are so related to Plaintiff's federal claim that they form part of the
28 same case or controversy under Article III of the U.S. Constitution.



FACTUAL ALLEGATIONS

14. On information and belief, Defendant owns and operates the Internet website located at <www.lovegenietips.com> (the "Website"). The Website offers consumers the opportunity to enroll in a subscription SMS text plan¹, whereby consumers receive three flirting tips per week for \$9.99 per month.

15. The Website's home page displays this offer and provides a method through which consumers can enroll in the Subscription Plan.

16. Consumers who visit the Website, and who are interested in paying for recurring flirting tips, voluntarily enter their personal information (including their mobile phone number) so that they can receive Defendant's flirting tips for \$9.99 per month, billed to their mobile phone account.

17. However, the vast majority—if not all—of the Subscription Plan members did not become members voluntarily.

18. Through unknown means, Wise Media obtained the mobile phone numbers of consumers without their knowledge or consent. Defendant obtained these numbers even though consumers had never visited the Website, had never expressed interest in Defendant or the Subscription Plan, and had no relationship with Defendant.

19. Without any action or solicitation by the consumers, Defendant sent SMS texts to the mobile phone numbers that it had acquired.

20. On information and belief, Defendant sent these SMS texts using equipment that had the capacity to store or produce telephone numbers to be called, using a random sequential number generator.

21. These texts stated:

Lovegenietips Flirting Tips; 3msg/week for \$9.99/m T&Cs:
lovegenietips.com Msg&data rates may apply. Reply HELP for help, STOP
to cancel. PIN 5WY6 (the "Initial Text")

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¹ An "SMS message" is a text message call directed to a wireless device through the use of the telephone number assigned to the device.



1 22. Most consumers who received the Initial Text from Defendant did not
2 recognize the sender, and thus chose to disregard the message.

3 23. Defendant sent the Initial Texts knowing that the vast majority—if not all
4 consumers—would not recognize the sender and would disregard the message, resulting
5 in their enrollment in the Subscription Plan.

6 24. Specifically, if a consumer did not respond to Defendant's Initial Text in a
7 manner of minutes, Defendant enrolled the consumer in the Subscription Plan and sent
8 the consumer the following text:

9 Lovegenietips: You joined \$9.99/m for 3msg/wk bill to cell. Reply HELP for
10 help, STOP to cancel. Msg&Data rates may apply. T&Cs:
lovegenietips.com

11 25. Thus, Defendant sent the Initial Texts as part of an overt effort to dupe
12 consumers into involuntarily enrolling in the Subscription Plan.

13 26. Once enrolled, Defendant billed the consumer \$9.99 per month for the
14 Subscription Plan until the consumer cancelled the service.

15 27. Defendant's conduct is particularly egregious because not only did
16 Defendant involuntarily enroll consumers in a fee-based service, Defendant also failed to
17 provide the services it claimed that it was charging consumers for—*i.e.* the consumers
18 never received the weekly flirting tips.

19 Plaintiff Humble

20 28. On or about January 6, 2012, Plaintiff Humble received an SMS text
21 message from a five-digit number, 836-60. The text of the message read: "Lovegenietips
22 Flirting Tips; 3msg/week for \$9.99/m T&Cs: lovegenietips.com Msg&data rates may
23 apply. Reply HELP for help, STOP to cancel. PIN 5WY6."

24 29. Because Humble did not recognize the five-digit sender number,
25 Lovegenietips Flirting Tips, or lovegenietips.com, he took no action in response to the
26 SMS text.

27 30. Two minutes later, Humble received a second SMS text message from the
28 same five-digit number 836-60. The text of the message read: "Lovegenietips: You



1 joined \$9.99/m for 3msg/wk bill to cell. Reply HELP for help, STOP to cancel. Msg&Data
2 rates may apply. T&Cs: lovegenietips.com.”

3 31. As before, because Humble did not recognize the five-digit sender number,
4 Lovegenietips Flirting Tips, or lovegenietips.com, he took no action in response to the
5 second SMS text.

6 32. Humble had no intention of enrolling in the Subscription Plan. In support of
7 this lack of any intention to enroll in the Subscription Plan, Humble relied on the fact that
8 he did not have a relationship with Defendant, had not solicited any goods or services
9 from Defendant, and had not responded to any of Defendant’s texts.

10 33. On or about February 6, 2012, Humble received a third SMS text message
11 from the same five-digit number 836-60. The text of the message read: “LoveGenieTips:
12 Subsc renewed 1mo. 3msg/week for \$9.99/mo billed to cell. Msg&Data rates may apply.
13 Reply Help for help. Reply Stop to cancel. 888.725.5643.”

14 34. At this point, Humble became suspicious and decided to check his bank
15 accounts and cell phone bill for unauthorized charges. Humble’s AT&T cell phone bill for
16 the period dating from December 26, 2011 through January 25, 2012 was thirteen (13)
17 pages long. At the very end of the bill, on the thirteenth page, Humble noticed a Monthly
18 Subscription charge under the Mobile Purchases & Downloads Charges section dated
19 January 6, 2012 for LoveGenieTips Alerts in the amount of \$9.99. Under the category of
20 Content Provider, the bill provided the information “Wise Media For assistance contact:
21 <http://www.goldpocket.com>.”

22 35. Humble never authorized this charge for LoveGenieTips Alerts, which was
23 charged to his cell phone bill the same day and presumably minutes after he received the
24 first SMS text message from 836-60.

25 36. As a result of Defendant’s misconduct, Humble has been harmed.

26 CLASS ACTION ALLEGATIONS

27 37. Pursuant to Federal Rule of Civil Procedure 23, Plaintiff brings this action
28 on his own behalf and as a representative of all persons who: a) received unsolicited



1 SMS text messages from or on behalf of Defendant, and b) who were charged for
2 Defendant's Subscription Plan on their cell phone bills (the "Class").

3 38. Pursuant to Federal Rule of Civil Procedure 23, Plaintiff also brings this
4 action on his own behalf and as a representative of all persons who: a) received
5 unsolicited SMS text messages from or on behalf of Defendant, b) who were charged for
6 Defendant's Subscription Plan on their cell phone bills, and c) who resided in California
7 during some or all of their enrollment in the Subscription Plan (the "California Subclass").

8 39. A class action is appropriate here because there exists an ascertainable
9 class and a well-defined community of interest in the questions of law and fact involved.

10 40. The Class and California Subclass are readily ascertainable from
11 Defendant's records.

12 41. A class action is the superior method for adjudicating this controversy
13 because: a) the Class and California Subclass are so numerous that the joinder of all
14 members is impracticable, b) questions of law and fact common to the Class and
15 California Subclass predominate over any question affecting only individual Class
16 members, and c) the claims of the representative Plaintiff are typical of the claims of the
17 Class and California Subclass, and the representative Plaintiff will fairly and adequately
18 protect the interests of the Class and California Subclass.

19 42. The common questions of law and fact include:

- 20 • Whether Defendant violated the Telephone Consumer Protection
- 21 Act, 47 U.S.C. §227 by sending commercial text messages to
- 22 Humble and the other Class members without their express consent;
- 23 • Whether Defendant violated the equitable doctrine of Money Had
- 24 and Received by enrolling Plaintiff and the other Class members in
- 25 the Subscription Plan without their knowledge or authorization and
- 26 then charging them \$9.99 per month for the enrollment;
- 27 • Whether Defendant engaged in an unfair, unlawful, or fraudulent
- 28 business practice in violation of California Business and Professions



Code section 17200, by enrolling Plaintiff and the California Subclass members in the Subscription Plan without their knowledge or authorization;

- Whether Defendant converted the money of Plaintiff and the other California Subclass members by enrolling them in the Subscription Plan without their knowledge or authorization and then charging them \$9.99 per month for the enrollment.

43. Plaintiff can and will fairly and adequately represent and protect the interests of the Class and California Subclass because:

- All of the questions of law and fact regarding the liability of Defendants are common to the Class and predominate over any individual issues that may exist, such that by prevailing on his own claim, Plaintiff will necessarily establish the liability of Defendants as to all Class members;
- Without the representation provided by Plaintiff, it is unlikely that any Class members would receive legal representation and/or obtain recourse for the misconduct carried out by Defendants; and
- Plaintiff has retained competent attorneys who are experienced both in the conduct of class actions and the law governing online advertising, negative options and e-commerce, and online payment systems. Plaintiff and his counsel have the necessary resources to litigate this class action, and Plaintiff and his counsel are aware of their fiduciary responsibility to the Class members and are determined to discharge those duties to obtain the best possible recovery for the Class and the California Subclass.

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FIRST CLAIM FOR RELIEF**(Violation of Telephone Consumer Protection Act, 47 U.S.C. §227 on behalf of Plaintiff and the Class)**

44. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs.

45. Defendant sent SMS texts to Plaintiff and the other members of the Class.

46. On information and belief, Defendant sent SMS texts to Plaintiff and the other members of the Class using equipment that had the capacity to store or to produce telephone numbers to be called, using a random sequential number generator.

47. The text messages sent by Defendant to Plaintiff and the other members of the Class were calls within the meaning of the Telephone Consumer Protection Act.

48. Neither Plaintiff nor any other member of the Class provided Defendant with prior express consent to receive the text messages.

49. Defendant's sending of texts to Plaintiff and the other Class members violated 47 U.S.C. §227(b)(1)(A).

50. As a result of Defendant's unlawful conduct, Plaintiff and the other Class members were harmed.

SECOND CLAIM FOR RELIEF**(Money Had and Received on behalf of Plaintiff and the Class)**

51. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs.

52. Defendant involuntarily enrolled Plaintiff and the other Class members in the Subscription Plan.

53. Once enrolled, Defendant charged Plaintiff and the other Class members \$9.99 per month until they cancelled the Subscription Plan.

54. Neither Plaintiff nor any other Class member authorized their enrollment in the Subscription Plan or the \$9.99 per month charge for the Subscription Plan.

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CLASS ACTION COMPLAINT

1 64. Defendant's above-described misconduct is an unfair business practice, as
2 that term is used in Business and Professions Code section 17200, because Defendant's
3 conduct offends established public policies and is immoral, unethical, oppressive,
4 unscrupulous and substantially injurious to consumers.

5 65. Defendant's above-described misconduct is an unlawful business practice,
6 as that term is used in Business and Professions Code section 17200, because
7 Defendant's conduct violates 47 U.S.C. §227, Business and Professions Code section
8 17602, 47 C.F.R. §64.3100, and Public Utilities Code section 2890.

9 66. Defendant's misconduct is an unlawful business practice in violation of 47
10 U.S.C. §227 because Defendant sent SMS texts to Plaintiff and the other members of the
11 California Subclass, without their express consent, using equipment that had the capacity
12 to store or to produce telephone numbers to be called, using a random sequential number
13 generator.

14 67. Defendant's misconduct is an unlawful business practice in violation of
15 Business and Professions Code section 17602 because Defendant made an automatic
16 renewal and/or continuous service offer to Plaintiff and the other members of the
17 California Subclass and: a) failed to present the terms of the offer in clear and
18 conspicuous manner before the Subscription Plan agreement was fulfilled, b) charged
19 the accounts of Plaintiff and the other California Subclass members without first obtaining
20 their affirmative consent, and c) failed to provide an acknowledgement of the purchase of
21 the Subscription Plan with the terms, cancellation policy, and information regarding how
22 to cancel in a manner that was capable of being retained by a consumer.

23 68. Defendant's misconduct is an unlawful business practice in violation of 47
24 C.F.R. §64.3100 because Defendant initiated mobile service commercial messages
25 without qualifying for any of the exceptions outlined in the regulation.

26 69. Defendant's misconduct is an unlawful business practice in violation of
27 Public Utilities Code section 2890 because Defendant caused the cellular telephone bills
28 for Plaintiff and the other California Subclass members to contain charges for products



1 and services other than what Plaintiff and the other California Subclass members had
2 authorized.

3 70. By carrying out the above-described misconduct, Defendant engaged in an
4 unlawful, unfair, and fraudulent business practice in violation of California Business and
5 Professions Code section 17200.

6 71. As a result of Defendants' misconduct, Plaintiff and the other California
7 Subclass members were harmed.

8 **FOURTH CLAIM FOR RELIEF**

9 **(Conversion on behalf of Plaintiff and the California Subclass)**

10 72. Plaintiff incorporates by reference the allegations contained in the
11 preceding paragraphs.

12 73. Plaintiff and the other members of the California Subclass owned the \$9.99
13 per month that was charged to them by Defendant during the duration of their involuntary
14 enrollment in the Subscription Plan.

15 74. Defendant disposed of the money of Plaintiff and the other California
16 Subclass members in a manner that was inconsistent with their rights in this money.

17 75. The money wrongfully taken by Defendant from Plaintiff and the other
18 members of the California Subclass comprises a specific, identifiable sum.

19 76. Defendant engaged in this misconduct with oppression, fraud, and malice.

20 77. As a result of Defendant's misconduct, Plaintiff and the other members of
21 the California Subclass have suffered damages.

22 **PRAYER FOR RELIEF**

23 **WHEREFORE**, Plaintiff respectfully request judgment as follows:

- 24 1. That the Court enter a judgment finding that Defendant has:
 - 25 a. Violated the Telephone Consumer Protection Act, 47 U.S.C. §227;
 - 26 b. Violated the equitable doctrine of Money Had and Received;
 - 27 c. Violated California Business and Professions Code section 17200;
 - 28 d. Committed Conversion;



2. That the Court award damages and monetary relief as follows:

- a. The greater of Plaintiff's and the other Class members' actual monetary loss or \$500 for each violation of the Telephone Consumer Protection Act;
- b. Damages in an amount to be determined at trial in the form of restitution of the money wrongfully charged to Plaintiff and the other Class members under the equitable doctrine of Money Had and Received and California Business and Professions Code section 17200;
- c. Compensatory damages in an amount to be determined at trial for Defendant's conversion;
- d. Exemplary damages pursuant to California Civil Code §3294;
- e. Treble damages under the Telephone Consumer Protection Act;
- f. Plaintiff's costs;

3. Such other relief that the Court determines is just and proper.

Respectfully Submitted,

DATED: March 9, 2012

KRONENBERGER ROSENFELD, LLP

By: 

Jeffrey M. Rosenfeld

Attorneys for Plaintiff



REQUEST FOR JURY TRIAL

Plaintiff hereby demands a trial of this action by jury.

DATED: March 9, 2012

KRONENBERGER ROSENFELD, LLP

By: _____


Jeffrey M. Rosenfeld

Attorneys for Plaintiff

KRONENBERGER ROSENFELD

150 Post Street, Suite 520, San Francisco, CA 94108

